No. 10229

United States
Circuit Court of Appeals
For the Ninth Circuit.

AMERICAN SURETY COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
District of Montana

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Billings, Montana.

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Billings, Montana.
Attorneys for Defendant American Surety Company and Appellant. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

Be It Remembered, that on August 5, 1940, a Complaint was duly filed herein, in the words and figures following, towit: [2]

In the District Court of the United States
District of Montana
Great Falls Division

No. 203

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN V. GROGAN, and AMERICAN SURETY COMPANY, a corporation,
Defendants.

COMPLAINT

Comes now the plaintiff and for cause of action against the defendants complains and alleges as follows:

I.

That the United States of America is the party plaintiff herein and brings this action on its own behalf, and this court has jurisdiction hereof by reason of the provisions of Section 41, Title 28, United States Codes.

II.

That at all of the times herein mentioned the American Surety Company, a corporation, was, is and continues to be a corporation duly organized

and existing under the laws of the State of New York and authorized to become a surety for hire.

III.

That on or about the 24th day of June, 1931, the plaintiff, being desirous of erecting certain buildings at the United States Inspection Station at Babb-Piegan, Glacier County, within the State and District of Montana, entered into a certain contract in writing with the defendant John V. Grogan, a full, true and correct copy of which said contract, save and except the specifications for construction and the maps and drawings thereto, which were made a part of the said contract, and save and except the directions for [3] the preparation of the Contract, is hereto attached, marked Exhibit "A", and hereof made a part.

IV.

That on or about the 29th day of June, 1931, the defendant John V. Grogan, as principal, and the defendant American Surety Company, a corporation, as surety, for the purpose of complying with the regulations of the plaintiff, and insuring the due performance of the said contract, Exhibit "A", made, executed and delivered to the plaintiff a bond in the penal sum of $25,000.00, a full, true and correct copy of the said bond, except for the instructions for executing the same, is hereto attached, marked Exhibit "B", and hereof made a part. That the said defendant American

Surety Company, a corporation, was a surety for hire on said bond.

V.

That a notice to proceed as required by said contract was given to the defendant John V. Grogan, by the plaintiff, on the 8th day of July, 1931, and thereupon the said defendant John V. Grogan commenced his performance of said contract.

VI.

That after the 8th day of July, 1931, but prior to the date fixed in said contract as the date for the completion of the said work, and while the contract was in full force and effect, it became necessary that certain changes be made in the work to be done, and that certain extra work be done and materials furnished of the reasonable value of $3,921.00, and which would increase the amount due under the said contract from $49,970.00 to $53,891.00, and as provided in the said contract such extra work to be done and materials to be furnished was ordered and the price fixed and the said John V. Grogan did agree to do such extra work and furnish such materials and to perform the said contract including the doing of the said extra work and the furnishing of said extra materials for the total sum or price payable to him of $53,891.00. [4]

VII.

That although it was provided in the said contract that the work was to be completed within 240 calendar days after the date of receipt of notice

to proceed, for various causes considered excusable under Article 9 of said contract, the said defendant John V. Grogan was delayed 473 calendar days in the performance of said contract and at his request, and with the consent of the plaintiff, and of the defendant American Surety Company, a corporation, the time for the completion of the work under the said contract was extended to June 20, 1933.

VIII.

That on June 20, 1933, the said defendant John V. Grogan had not completed the work that he agreed to perform under said contract and said work had not been entirely done and the said John V. Grogan had not performed his said contract as he had promised and agreed to do by completing the said work and all thereof agreed by him to be completed on the 20th day of June, 1933; and the said defendant John V. Grogan had not on July 20, 1934, completed all of the work that he promised and agreed to complete under his said contract and a part thereof was uncompleted, and said defendand John V. Grogan on said last mentioned date being in default in the performance of his said contract and having breached the same by not then on that date having completed all of the work that he promised and agreed to complete and to do under his said contract, the plaintiff, acting under the authority given to it in the said contract and in accordance with the terms thereof, on the said 20th day of July, 1934, notified the

said defendant John V. Grogan in writing that his right to proceed under the said contract was terminated on said date. [5]

IX.

That because of the wrongful refusal of the said defendant John V. Grogan to complete his said contract and perform the same and do all of the work he promised and agreed to do in said contract, it became necessary for the plaintiff to complete and cause the said work to be completed, and that in doing the same and completing the said work, the plaintiff expended in the completion of the same the sum of $3,781.00, which said sum was and is the reasonable value of completing the said work, that the said defendant John V. Grogan promised and agreed to do and complete; that because of the wrongful failure and neglect of the said defendant John V. Grogan to complete his said contract and fulfill the terms thereof and do the work he had promised and agreed to do, it became necessary for the plaintiff to employ a construction engineer from the 21st day of June, 1933, to the 30th day of June, 1934, both dates inclusive, and that the plaintiff was required to and did pay to said construction engineer for his services performed during said period of time the said sum of $2,288.62; that in addition the plaintiff was required by reason of the default and failure of the said defendant John V. Grogan as aforesaid to complete his said contract as afore-

said to cause inspections to be made on the said work done and performed by the defendant John V. Grogan on January 10, July 27, October 19, November 8 and December 7, 1934, and that the plaintiff, in so doing, necessarily laid out and expended for traveling expenses of engineers and their salaries, while engaged in said inspections, and their transportation, the sum of $414.00.

X.

That up to the 20th day of June, 1933, the plaintiff had paid to the said defendant John V. Grogan, for the work performed by him under the said contract, the sum of $49,602.50; [6] that by reason of the wrongful failure and refusal of the said defendant John V. Grogan to perform his said contract and to complete the work that he had promised and agreed to complete, the plaintiff was required to and did lay out and expend the sum of $6,483.62 in completing the said work that the said defendant John V. Grogan had promised and agreed to do and perform and complete, making a total cost to the plaintiff of $56,086.12; that had the said defendant John V. Grogan performed the said contract and completed the said work as he promised and agreed to do, the plaintiff would have been required to pay therefor only the sum of $53,891.00, and that by reason of the wrongful failure, refusal and neglect of the said John V. Grogan to perform his said contract and complete the work that he promised and agreed to complete, the plaintiff has been damaged in the sum of $2,195.12.

XI.

That paragraph 5 of the specifications which are attached to and made a part of the said contract, provided:

> "5. Liquidated Damages.—The contractor shall pay to the government the amount of Twenty Five Dollars ($25.00) as fixed, agreed, and liquidated damages for each calendar day's delay in the completion of the contract."

That said defendant John V. Grogan delayed his completion of the said contract for the period of 395 calendar days and thereby the plaintiff is and was damaged in the amount or sum of $9,875.00, in addition to the damages hereinabove set out.

XII.

That prior to the commencement of this action and on or about the 1st day of November, 1937, the plaintiff demanded of and from the defendants John V. Grogan and American Surety Company, a corporation, that they pay to it the sum of $12,070.12, the amount of damage sustained by the plaintiff by reason of the failure and default of the said defendant John V. Grogan in his [7] refusal to perform his said contract as aforesaid, but that the said defendants, and each of them, failed, refused and neglected to pay the said sum of $12,070.12, or any part or portion thereof and there is now due, owing and wholly unpaid from the defendants to the plaintiff the said sum of $12,070.12, together with interest thereon at the

rate of 6% per annum from the 1st day of November, 1937.

XIII.

That the plaintiff duly performed all of the conditions precedent on its part to be performed under said contract.

Wherefore, plaintiff prays damages against the said defendants and each of them for the sum of $12,070.12, together with interest thereon at the rate of 6% per annum from the 1st day of November, 1937, together with the plaintiff's costs and expenses necessarily incurred and disbursed in this action.

R. LEWIS BROWN,
Assistant Attorney of the United States, in and for the District of Montana.
Attorney for Plaintiff.

[8]

EXHIBIT A

CONTRACT FOR CONSTRUCTION

This Contract, entered into this 24th day of June, 1931, by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and John V. Grogan, of the city of Junction City, in the State of Kansas, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

Exhibit A (Continued)

Article 1. Statement of work.—The contractor shall furnish all labor and materials, and perform all work required for construction of the Main Station Building, as indicated on drawing No. 1, including Collecting Tank and Pump House indicated on drawing No. 4-1, at the United States Inspection Station, Babb-Piegan, Montana, for the consideration of forty nine thousand nine hundred seventy dollars ($49,970.00), in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specification for the construction of the United States Inspection Station buildings at Babb-Piegan, Montana, with addenda therein, dated May 16, 1931, and drawings Nos. 1, 2, 3, 4, 100, 101, 200, 201, 202, 202A, 2-1, 2-2, 2-100, 3-1, 4-1, PHL-450, PHL-451, PHL-452, PHL-453, Miscellaneous 304E, 305G, Miscellaneous Lighting Fixtures 326B (said drawings being on file in the Office of the Supervising Architect, Treasury Department.

The work shall be commenced as soon as practicable after the date of receipt of notice to proceed, and shall be completed within two hundred forty (240) callendar days after the date of receipt of notice to proceed.

Article 2. Specifications and drawings.—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like ef-

Exhibit A (Continued)

fect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

Article 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, and equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment, the dispute

Exhibit A (Continued)

shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 4. Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called [9] immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and may increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

Article 5. Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article 6. Inspection.—(a) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any

Exhibit A (Continued)

and all times during manufacture and (or) construction and at any and all places where such manufacture and (or) construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

(b) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special, full size, and performance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the ex-

Exhibit A (Continued)

penses of such examination, and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 per cent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures, from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site. [10]

Article 7. Materials and workmanship.—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the specifica-

Exhibit A (Continued)

tions as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates installing, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to dismiss from the work such employees as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable.

Article 8. Superintendence by contractor.—The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

Article 9. Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Ar-

Exhibit A (Continued)

ticle 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work; in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof; Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God,

Exhibit A (Continued)

or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: Provided further, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto. [11]

Article 10. Permits and care of work.—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

Article 11. Eight-hour Law—Convict labor.—(a) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at

Exhibit A (Continued)

the site thereof. For each violation of the requirements of this article a penalty of five dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided, That this stipulation shall be subject in all respects to the exceptions and provisions of the act of June 19, 1912 (37 Stat. 137), relating to hours of labor.

(b) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article 12. Covenant against contingent fees.—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Article 13. Other contracts.—The Government may award other contracts for additional work, and the contractor shall fully co-operate with such other contractors and carefully fit his own work to that

Exhibit A (Continued)

provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

Article 14. Officials not to benefit.—No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

Article 16. Payments to contractors.—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on [12] the site and preparatory work done may be taken into consideration.

Exhibit A (Continued)

(b) In making such partial payments there shall be retained 10 per cent on the estimated amount until final completion and acceptance of all work covered by the contract: Provided, however, That the contracting officer, at any time after 50 per cent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: And provided further, That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sold property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than

Exhibit A (Continued)

such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

Article 17. Additional security.—Should any surety upon the bond for the performance of this contract become unacceptable to the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interest of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

Article 18. Definitions.—(a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative.

Article 19. Alterations.—The following changes were made in this contract before it was signed by the parties hereto:

The erasure of the words "other than the contracting officer" in paragraph a, Article 18, and the addition of page 2-A relative to the "Rate of Wage" to be paid by the contractor, to which contractor consented in his telegram dated June 20, 1931.

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

Exhibit A (Continued)

We hereby certify that this contract and bond have been correctly prepared. [13]

THE UNITED STATES OF AMERICA.

By PERRY K. HEATH,
Assistant Secretary of the Treasury,
(Official Title)

JOHN V. GROGAN,
Contractor.
Junction City, Kan.
(Business Address)

H. S. ROOME,
Chief, Law & Records Division.

H. S. ROOME.

G. R. ROBERTS,
Actg. Supt., Architectural Engrg.

C. R. ROBERTS.

Two witnesses:

W. F. STEWART,
Junct. City, Kan.

W. A. ROBERTS.

I, ..., certify that I am the ..... Secretary of the corporation named as contractor herein; that ..... who signed the contract on behalf of the contractor, was then ..... of said corporation; that said contract was duly signed for and in behalf

Exhibit A (Continued)

of said corporation by authority of its governing body, and within the scope of its corporate powers.

.....

(Corporate Seal)

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, ... who signed this contract for the ..... had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

.....

Contracting Officer.

This contract is authorized by the acts of May 29, 1928, V. 45, p. 919; December 20, 1928, V. 46, p. 120; March 26, 1930, V. 46, p. 120; May 13, 1930, V. 46, p. 276; May 15, 1930, V. 46, p. 349. [14]

Rate of Wage—The following paragraph pertaining to the Rate of Wage shall apply to every contract in excess of five thousand dollars ($5,000) in amount:

The rate of wage for all laborers and mechanics employed by the contractor, or any sub-contractor, on the public building covered by this contract shall be not less than the prevailing rate of wages for work of a similar nature in the city, town, village or other civil division of the state in which the public building is located. In case any dispute arises as to what are the prevailing rates of wages

Exhibit A (Continued)

for work of a similar nature applicable to the contract which cannot be adjusted by the contracting officer, the matter shall be referred to the Secretary of Labor for determination and his decision thereon shall be conclusive on all parties to the contract, as provided in the Act of March 3, 1931 (Public No. 798). [15]

EXHIBIT "B"

Standard Form No. 25
Approved by the President
Nov. 19, 1926

STANDARD GOVERNMENT FORM OF PERFORMANCE BOND

(Construction or Supply)

Know All Men By These Presents, That we, John V. Grogan, of Junction City, Kansas, (See Instructions 4, 5 and 7) as Principal, and American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, whose principal office is located at 100 Broadway, New York City, New York, as Surety, (See Instructions 2, 3, 4 and 7)

are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of Twenty-five Thousand dollars lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated June 24th, 1931, for construction of the Main Station Building, as indicated on drawing No. 1, including Collecting Tank and Pump House, indicated on drawing No. 4-1, at the United States Inspection Station, Babb-Piegan, Montana.

Now Therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, and if said contract is for the construction or repair of a public building or a public work within the meaning of the Act of August 13, 1894, as amended by act of February 25, 1905, shall promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract, and any such authorized extension or modification thereof, then, this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties

have executed this instrument under their several seals this 29 day of June, [16] 1931, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

[Seal] JOHN V. GROGAN,
Junction City, Kan.

In presence of—
M. F. STEWART,
Junction City, Kansas.
(Address)

Attest:

AMERICAN SURETY
COMPANY OF NEW YORK,
(Corporate Surety)
320 Patterson Bldg.
Denver, Colorado.
(Business Address)

(Affix corporate seal)

By J. C. SMITH,
J. C. SMITH
Resident Vice President.

A. QUINN
A. QUINN, Resident
Assistant
Secretary

The rate of premium on this bond is 15 per thousand, based on contract price.

Total amount of premium charged, $749.55.

(The above must be filled in by corporate surety.)

[Endorsed]: Filed Aug. 5, 1940. [17]

Thereafter, on October 8, 1940, a Motion to Strike, and Notice thereof, were duly filed herein, as follows, towit: [18]

[Title of District Court and Cause.]

MOTION TO STRIKE PORTION OF PLAINTIFF'S COMPLAINT

Comes now the Defendant, American Surety Company, a corporation, by and through the undersigned its attorneys, for itself and not for the remaining Defendant, and moves the court as follows, to-wit:

1. To strike from Plaintiff's complaint all of paragraph XI because the same is (a) redundant matter, and (b) immaterial matter.

Dated this 7th day of October, 1940.

STERLING M. WOOD,
ROBERT E. COOKE,
FREDRIC MOULTON,
By STERLING M. WOOD,
Attorneys for Defendant,
American Surety Company,
a corporation.
Address: Billings, Montana.

[Endorsed]: Filed Oct. 8, 1940. [19]

[Title of District Court and Cause.]

NOTICE OF MOTION

To R. Lewis Brown, Esquire, Assistant Attorney of the United States in and for the District of Montana, Attorney for Plaintiff, and to the Said Plaintiff:—

Please take notice that upon the complaint herein the motion of the above-named Defendant, American Surety Company, a corporation, to strike certain portions of the Plaintiff's complaint will be presented for hearing and determination in the above-named court before the Honorable Charles N. Pray, Judge thereof, at the courtroom in the Postoffice Building in the City of Billings, County of Yellowstone, State of Montana, at the opening day of the next term of the said court at Billings, Montana, or as soon thereafter as counsel can be heard.

Dated this 7th day of October, 1940.

STERLING M. WOOD,
ROBERT E. COOKE,
FREDRIC MOULTON,
By STERLING M. WOOD,
Attorneys for Defendant,
American Surety Company,
a corporation.
Address: Billings, Montana.

[Endorsed]: Filed Oct. 8, 1940. [20]

Thereafter, on July 22, 1941, an Order denying Motion to Strike, was duly entered herein, the minute entry thereof being in the words and figures following, towit: [21]

[Title of District Court and Cause.]

This cause having heretofore been submitted to the Court, on Motion of American Surety Co., to strike from complaint, came on regularly for decision this day, whereupon the court filed its written decision thereon and ordered said motion denied.

Dated July 22, 1941.

C. R. GARLOW,
Clerk. [22]

Thereafter, on September 17, 1941, Answer was duly filed herein, as follows, towit: [23]

[Title of District Court and Cause.]

ANSWER

Comes now the Defendant, American Surety Company, a corporation, in the above-entitled action, whose true name is American Surety Company of New York, by and through the undersigned its attorneys, for itself alone and not for the remaining defendant, and for answer to Plaintiff's complaint admits, denies and alleges as follows, towit:

I.

Admits the allegations of paragraphs I, II, III and IV of Plaintiff's complaint, but alleges that this answering Defendant's true name is American Surety Company of New York;

II.

That this answering Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph V of Plaintiff's complaint;

III.

Admits the allegations of paragraph VI of Plaintiff's complaint;

IV.

Admits as alleged in paragraph VII of Plaintiff's complaint that under the contract provisions the work was to be completed within 240 calendar days after the date of receipt of notice to proceed; admits further that for various causes excusable under Article 9 of the said contract the defendant, John V. Grogan, was delayed, and that the time for the completion of the work under the said contract was [24] extended with the consent of the Plaintiff and of this answering Defendant, but denies each, all and every of the remaining, other and further allegations of paragraph VII of Plaintiff's complaint;

V.

Admits as alleged in paragraph VIII of Plaintiff's complaint that on June 20th, 1933, the De-

fendant, John V. Grogan, had not completed the work agreed to be performed under the said contract; admits further that the said John V. Grogan had not on July 20th, 1934, completed all of the work under the said contract; admits also as alleged in paragraph VIII of Plaintiff's complaint that the Plaintiff acting under the said contract and on the 20th day of July, 1934, notified the Defendant, John V. Grogan, in writing that his right to proceed under the said contract was terminated, but denies each, all and every of the remaining, other and further allegations of paragraph VIII of Plaintiff's complaint;

VI.

Denies the allegations of paragraphs IX and X of Plaintiff's complaint;

VII.

Admits as alleged in paragraph XI of Plaintiff's complaint that paragraph 5 of the specifications attached to and made a part of the contract therein mentioned provides in part that the contractor shall pay to the government the amount of $25.00 as fixed, agreed and liquidated damages for each calendar day's delay in the completion of the contract, but denies each, all and every of the remaining, other and further allegations of paragraph XI of Plaintiff's complaint;

VIII.

Admits as alleged in paragraph XII of Plaintiff's complaint that prior to the commencement of this action and on or about the 1st day of November, 1937, Plaintiff demanded of and from this answering Defendant payment of the sum of $12,070.12; admits [25] further that this answering Defendant has refused to pay the said sum, but denies each, all and every of the remaining, other and further allegations of paragraph XII of Plaintiff's complaint;

IX.

That this answering Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph XIII of Plaintiff's complaint.

And further answering Plaintiff's complaint and by way of defense thereto, this answering Defendant alleges:

1.

That on or about the 17th day of October, 1933, the said Defendant, John V. Grogan, had substantially completed and performed the contract mentioned in Plaintiff's complaint, leaving only an unsubstantial part of the said contract then unperformed.

Wherefore, having fully answered Plaintiff's complaint this answering Defendant prays that the said Plaintiff recover nothing thereunder and that the

said answering Defendant recover its costs of suit herein incurred.

STERLING M. WOOD,
ROBERT E. COOKE,
By STERLING M. WOOD,
Attorneys for Answering Defendant, American Surety Company of N. Y.
Address: 219-223 Securities Bldg., Billings, Montana.

[Endorsed]: Filed Sept. 17, 1941. [26]

Thereafter, on December 5, 1941, Original Transcript of Evidence was duly filed herein, being in the words and figures following, towit: [27]

[Title of District Court and Cause.]

ORIGINAL TRANSCRIPT OF EVIDENCE

Appearances:

For United States
R. LEWIS BROWN, Esq.,
D. W. MURRAY, Esq.

For Defendants
MESSRS. WOOD & COOK. [28]

Be It Remembered, That this matter came on regularly for hearing at Great Falls, Montana, on

Saturday, November 29, 1940, before the Honorable Charles N. Pray, Judge Presiding, sitting without a jury.

Whereupon The following proceedings were had and done: [29]

The Court: We will take up the case on the calendar, of United States -vs- John J. Grogan, and American Surety Company. Are you ready to proceed with the case, Gentlemen?

Mr. Wood: Yes, we are ready.

Mr. Brown: We are ready.

The Court: Very well.

PLAINTIFF'S CASE

Mr. Brown: If the court please, I have a photostatic copy of the original records in Washington, numbered 1 to 398 inclusive, and they are certified to in one certificate, so that I will ask that the clerk cut the certificate, so that I may use it.

The Court: Very well.

Mr. Brown: We will offer in evidence plaintiff's proposed exhibit No. 1.

Mr. Wood: I would like to have the record show that at this time the defendant, American Surety Company, objects to the introduction of any evidence upon the ground that the complaint in this action fails to state a claim against the defendant, upon which any relief can be granted.

The Court: It is the same question we have already considered, is it not.

Mr. Wood: Not entirely. I presume you would just as leave that we file briefs afterwards.

The Court: I think probably a brief will be just as well. We have already had one phase of it, and, I believe, I stated at the conclusion of my statement then, that if you had any further authorities I would hear them.

Mr. Wood: That is right.

The Court: That if you had something further, or later [30] or something you may have discovered that you think has an important bearing on that issue, I will hear it, as I suggested in that memorandum.

Mr. Wood: I will be glad to present all these questions later. I will preserve my record as I go along. I have something to add to that objection. It is based upon the fact that it appears to us on the face of the complaint now, after careful consideration, that the government without right or authority terminated this contract, and thereby rescinded it, and discharged it, so that there is no obligation upon the part of either defendant, as far as that is concerned, in damages at this time.

The Court: You claim that the Government had no right to terminate the contract when it did.

Mr. Wood: Under the allegations of the complaint, we claim that the contractor continued on from June 20, 1933, to July 20, 1934, and that was some thirteen months beyond the date of completion. Then, at that time, the Government served a notice terminating the right to further proceed under the contract. Our contention now is that the Government, under the contract and under law,

in giving the notice to the contractor at that time, thereby breached the contract and discharged them, as far as the defendants are concerned, so that there is no liability upon their part now, which is simply another way of saying the complaint does not state a cause of action.

The Court: Very well, you may proceed Mr. District Attorney.

Mr. Brown: We now offer in evidence plaintiff's exhibit No. 1.

Mr. Wood: There is no objection to plaintiff's exhibit No. 1.

(Whereupon plaintiff's exhibit No. 1 was received in evidence, without objection, and is in words and figures as follows, to-wit: [31]

PLAINTIFF'S EXHIBIT No. 1

Case #203

UNITED STATES OF AMERICA

GENERAL ACCOUNTING OFFICE

Pursuant to the Act of June 10, 1921, 42 Stat. 24, I hereby certify that the annexed documents, numbered C-1 to C-398 inc., are true copies of the official documents now on file in the General Accounting Office in the following case: John V. Grogan.

In Witness Whereof, I have hereunto set my hand and caused the seal of the General Account-

ing Office to be affixed this 3rd day of February, in the year 1937, at Washington

[Seal] R. N. ELLIRS,
Acting Comptroller General
of the United States.

[Endorsed]: Filed Nov. 29, 1941. C. R. Garlow, Clerk.

General Accounting Office Form 7.

Mr. Brown: We offer in evidence, if the court please, the plaintiff's exhibit No. 2, and the plaintiff's exhibit No. 3, and I will say in that connection, we allege in paragraph 5, that notice to proceed to the contractor was given to the contractor on the 8th day of July, 1931, and the contractor commenced to perform under the contract. That is denied. [32]

Mr. Wood: I will say that we are encumbering the record with unnecessary documents. I will now admit that the allegations in paragraph 5 of plaintiff's complaint are true, in order to save proof upon that matter.

Mr. Brown: All right, we will withdraw the exhibit then.

The Court: Very well. That will simplify and expedite the matter.

Mr. Brown: Paragraph 7 seems to be the next paragraph in issue here.

The Court: Yes.

Mr. Wood: I will further concede, your honor; for the record, and save putting in unnecessary proof, that the defendant John V. Grogan was delayed four hundred and seventy three days in the performance of his contract and that at his request and with the consent of the plaintiff and of the defendant American Surety Company, the time for the completion of the work under the contract was extended until June 20, 1933.

Mr. Brown: I will withdraw the offer of exhibit 4 then, your honor.

The Court: Very well then. That is paragraph 7.

Mr. Brown: Yes.

Mr. Wood: There were some denials that were made necessarily at the time the pleadings were prepared. Then we did not have the facts fully before us, but after talking with Mr. Brown, what I can see I can concede I gladly will so as to save that proof.

Mr. Brown: If the court please, I have photostatic copies of the original documents, numbered by them, X-1 through X-12, inclusive. I have not marked the certificate of the General Counsel as to their authenticity. I don't need all of them. [33] I will ask that the clerk cut them, so that I will have access to those that I need.

The Court: Very well.

Mr. Brown: I offer in evidence plaintiff's exhibit No. 7.

Mr. Wood: No objection to plaintiff's exhibit No. 7. It may be received in evidence.

(Whereupon plaintiff's exhibit No. 7 was received in evidence, and is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT No. 7

Case #203.

UNITED STATES OF AMERICA

FEDERAL WORKS AGENCY

PUBLIC BUILDINGS ADMINISTRATION

Washington

Dec. 7, 1940.

I hereby certify that the annexed documents numbered X-1 through X-12, inclusive, are true and correct copies of the official documents on file in this Agency.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Federal Works Agency to be affixed, on the day and year first above written.

[Seal] ALAN JUHMTRUE,
General Counsel, Federal Works Agency.

[Endorsed]: Filed Nov. 29, 1941. C. R. Garlow, Clerk.

Mr. Brown: I offer in evidence, if the court please, plaintiff's exhibit No. 8. My purpose of this offer, which [34] is a letter from the United States to the Surety Company informing them that the contract had been cancelled, and inquiring of the Surety Company whether defendant, whether it desired to go ahead to complete the work. Now, I intend to follow that up with a letter back from the Surety Company, informing the United States that they did not desire to go ahead and complete the work. I intend in regular order to offer the contract.

Mr. Wood: The record already shows by admissions of the answers, that the notice had been given, the notice that the government relied upon, and these offered exhibits are unnecessary on that account, and I object to each of the offered exhibits as irrelevant for any purpose. I particularly object also to all this evidence as incompetent and particularly this type of evidence.

Mr. Brown: I offer exhibit No. 9, as long as objection was made to both of them I allege in the complaint that a notice was given to Grogan as to termination. My purpose is to show that it was done at the knowledge and request of the Surety Company. In connection with the notice in paragrapn 8, there are certain admissions made, and denials made of that paragraph.

The Court: I will overrule the objection to the admission of these letters.

(Whereupon plaintiff's exhibits 8 and 9

were received in evidence, and are in words and figures as follows, to-wit):

PLAINTIFF'S EXHIBIT No. 8

Case #203

Inclosure

Babb-Piegan, Mont
Insp'n St T 1 SA 1751

LEGAL [35]

July 20, 1934.

The American Surety Company of New York,
100 Broadway,
New York, N. Y.

Gentlemen:

Referring to the contract of John V. Grogan for the construction of the Inspection Station at Babb-Piegan, Montana, you are advised that the contractor's right to proceed with the work is terminated to take effect on this date.

An inventory of the work performed and material installed and upon the site will be taken by a construction engineer, and he has been directed to notify you of the date fixed by him for taking such inventory in order that you may have a representative present at the time if you so desire.

You are requested to acknowledge the receipt of this letter stating whether or not you desire to

complete the work as surety on the contractor's bond after the inventory has been taken.

Respectfully,

(Signed) G. P. PEOPLES,

Director of Procurement.

PLAINTIFF'S EXHIBIT No. 9

Case #203

Babb-Piegan Mont. Insp'n Sta

AMERICAN SURETY COMPANY

of New York

100 Broadway, New York

F. W. Lafrentz, Chairman of the Board.
R. R. Brown, Vice Chairman.
A. F. Lafrentz, President.

Legal Department

George L. Naught, Vice President and General Counsel.

July 23, 1934.

In re: B#-372473-D C#-143922 John V. Grogan-to-U. S. A.

Procurement Division, Public Works Branch,
Treasury Department,
Washington, D. C. [36]

Att'n Dir. of Procurement.

Gentlemen:

In reply to your letter of July 20th in regard to the contract of John V. Grogan for the con-

struction of the inspection Station at Babb-Piegan, Montana, you will please be advised that this Company as surety on the contractor's bond does not desire to complete the work. We therefore request that bids be obtained and the contract awarded to the lowest bidder.

Very truly yours,

GEORGE R. CROSBY,

Attorney.

(Received Division of Procurement Public Works Branch Jul 24 1934 S-1. Noted..... Ans's.....19)

[Endorsed]: Filed Nov. 29, 1941. C. R. Garlow, Clerk.

Mr. Brown: We offer in evidence Plaintiff's Exhibit No. 10.

Mr. Wood: At this time the defendant objects to Plaintiff's Exhibit 10 as incompetent; it not appearing therefrom, or from any other evidence, that the bids are proposed to be let as covered by exhibit 10 for the completion of the work under the Grogan contract in accordance with the specifications and plans of that Grogan contract. Also object to it as irrelevant. So that there be no misunderstanding, I am not objecting to the way it is proved, but my objection as to competency goes to the other question, failure to lay a foundation for putting in evidence of this character.

Mr. Brown: This is an advertisement for bids.

On its face [37] its says that bids will be received at treasury department, for furnishing all material, all labor and materials and performing all work for completion of construction of the United States Inspection Station at Babb-Piegan, Montana. Specifications may be obtained, and so forth, from the government office.

The Court: It may be admitted in evidence. The objection is overruled.

(Whereupon plaintiff's exhibit 10 was received in evidence, and is in words and figures as follows, to-wit):

PLAINTIFF'S EXHIBIT No. 10

Case #203

Babb-Piegan, Mont., U. S. Insp. Sta. Completion

Standard Government Form of Invitation for Bids (Construction Contract)

Treasury Department, Procurement Division, Public Works, Branch, Washington, D. C., May 22, 1934. Sealed Bids in Duplicate subject to the conditions contained herein, and of executive order No. 6646, Dated March 14, 1934, will be publicly opened in this office at 2 P. M., June 19, 1934, for furnishing all labor and materials and performing all work for completion of construction of the United States Inspection Station at Babb-

Piegan, Montana, Specifications may be obtained from the Custodian at the Building or at this office in the discretion of the assistant director of procurement, public works branch. W. E. Reynolds, assistant director of procurement, public works branch.

Notice to Printer

This notice when used as an advertisement must be set Solid. The notice is to be used as a pay advertisement only when accompanied by written authority from the Department. The law forbids payment for advertisements not previously authorized. [38]

Where copies of plans are requested, a deposit of $ No will be required to insure their return.

Guarantee will be required with each bid as follows: (See paragraph 8 of instructions to bidders and paragraphs 7-11 of the specification).

Performance bond will be required as follows: 50 per cent of the amount of the contract, if the contract amount to $2,000 or more.

Liquidated damages for *dealy* will be as provided in the specification.

Partial payments will be made. (See article 16 of contract as modified by the specification).

Article on patents will be made a part of the contract. (See directions on back of contract).

Preference for domestic materials is required by title 111 of the act of March 3, 1933, Public No. 428. (Copy Attached).

Bids must be submitted upon the Standard Government Form of Bid and if the contract amount to $2,000 or more, the successful bidder will be required to execute the Standard Government Form of Contract for Construction.

The right is reserved, as the interest of the Government may require, to reject any and all bids, to waive any informality in bids received, and to accept or reject any items of any bid, unless such bid is qualified by specific limitation.

Envelopes containing bids must be sealed, marked, and addressed as follows:

The Assistant Director of Procurement,
Public Works Branch,
Treasury Department,
Washington, D. C.

Bids for Completion
U. S. Insp. Station
Babb-Piegan, Montana.

To be opened at 2 P. M., June 19, 1934.

Note—See Standard Government Instructions to Bidders and copy of the Standard Government Form of Contract, Bid Bond, and Performance Bond, which may be obtained upon application.

Domestic Articles of Materials. The attention of Bidders is called to the Act of Congress, approved March 3, 1933, (Public No. 428) which provides:

Title 111.

Sec. 3 (A) Every contract for the construc-

tion, alteration, or repair of any public building or public work in the United States growing out of an appropriation heretofore made or hereafter to be made shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured [39] articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be in the United States except as provided in section 2: Provided however, that if the head of the department or independent establishment making the contract shall find that in respect to some particular articles, materials, or supplies it is impracticable to make such requirement or that it would unreasonably increase the cost, an exception shall be noted in the specifications as to that particular article, material, or supply, and a public record made of the findings which justified the exception.

(B) If the head of a department, bureau, agency or independent establishment which has made any contract containing the provision required by subsection (A) Finds that in the performance of such contract there has been a failure to comply with such provisions, he

shall make public his findings, including therein the name of the contractor obligated under such contract, and no other contract for the construction, alteration, or repair of any public building or public work in the United States or else where shall be awarded to such contractor, subcontractors, material men, or suppliers with which such contractor is associated or affiliated, within a period of three years after such finding is made public.

[Endorsed]: Filed Nov. 29, 1941. C. R. Garlow, Clerk.

Mr. Brown: Now, I offer in evidence Plaintiff's Exhibit No. 11, which is the contract entered into by the government.

Mr. Wood: We object to the offered exhibit, this being plaintiff's exhibit 11, upon the ground that it is incompetent, in that no proof or sufficient foundation has been laid or established that the government was proposing to complete the Babb-Piegan Station in accordance with the plans and specifications and contract with Grogan; also object to it as irrelevant.

The Court: Overruled.

Whereupon Plaintiff's Exhibit No. 11 was received in evidence, and is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT No. 11.

Case #203 TIPW 359

Standard Form No. 23

Approved by the President
Nov. 19, 1926

STANDARD GOVERNMENT FORM OF CONTRACT

(Construction) [40]

Procurement Division
Treasury Department
(Department)

McGinnis & Lancaster,
Box 134,
Browning, Montana
(Contractor)

Contract for completion of construction amount, $4,280.00

Place United States Inspection Station, Babb-Piegan, Montana.

CONTRACT FOR CONSTRUCTION

This Contract, entered into this 22nd day of August, 1934, by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and McGinnis & Lancaster, a corporation, a partnership, consisting of Daniel B. McGinnis and Wesley Earl Lancaster, of the city of Browning, in the State of Montana, hereinafter called the contractor,

Plaintiff's Exhibit No. 11 (Continued)

witnesseth that the parties hereto do mutually agree as follows:

Article 1. Statement of work: The contractor shall furnish all labor and materials, and perform all work required for completion of the construction of the Inspection Station at Babb-Piegan, Montana, for the consideration of four thousand two hundred eighty dollars ($4,280.00), in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specification for completion of construction of the United States Inspection Station at Babb-Piegan, Montana, dated May 22, 1934.

The work shall be commenced as soon as practicable after the date of receipt of notice to proceed, and shall be completed within sixty (60) calendar days after the date of receipt of notice to proceed.

Article 2. Specifications and drawings.—The contractor shall [41] keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the con-

Plaintiff's Exhibit No. 11 (Continued)

tracting officer, without whose decision said descrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary unless otherwise provided. Upon completion of the contract the work shall be delivered and undamaged.

Article 3. Changes—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be deter- [42] mined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Plaintiff's Exhibit No. 11 (Continued)

Article 4. Changed conditions.—Should the contractor encounter or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

Article 5. Extras—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article 6. Inspection—(a) All material and workmanship (If not otherwise designated by the specifications) shall be subject to inspection, examination, and test by the Government inspectors at any and all times during manufacture and (or) construction and at any and all places where such manufacture and (or) construction are carried on.

Plaintiff's Exhibit No. 11 (Continued)

The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily [43] corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

(b) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special, full size, and performance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing our same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is

Plaintiff's Exhibit No. 11 (Continued)

found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 per cent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of [44] production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

Article 7—Materials and workmanship—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the speci-

Plaintiff's Exhibit No. 11 (Continued)

fications as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates installing, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to dismiss from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable. [45]

Article 8. Superintendence by contractor—The contractor shall give his personal superintendence of the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

Article 9. Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Ar-

Plaintiff's Exhibit No. 11 (Continued)

ticle I, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages [46] because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of

Plaintiff's Exhibit No. 11 (Continued)

God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: Provided further, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his finding of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

Article 10. Permits and care of work—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

Article 11. Eight-hour law—Convict labor—(a) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours

Plaintiff's Exhibit No. 11 (Continued)

in any one calendar day upon such work at the site thereof. For each violation of the requirements of this article a penalty of five [47] dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided, That this stipulation shall be subject in all respects to the exceptions and provisions of the act of June 19, 1921 (37 Stat. 137), relating to hours of labor.

(b) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

Article 12. Covenant against contingent fees—The contractor warrants that he has not employed any person to solicitor or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Article 13.—Other contracts—The Government may award other contracts for additional work, and

Plaintiff's Exhibit No. 11 (Continued)

the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

Article 14. Officials not to benefit—No member of or Delegate to Congress, or Resident Commissioner, shall be admitted to [48] any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 15. Dispute—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

Article 16. Payments to contractors—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and pre-

Plaintiff's Exhibit No. 11 (Continued)

paratory work done may be taken into consideration.

(b) In making such partial payments there shall be retained 10 per cent on the estimated amount until final completion and acceptance of all work covered by the contract: Provided, however, That the contracting officer, at any time after 50 per cent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: and provided further, that on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, [49] including retained percentages thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified

Plaintiff's Exhibit No. 11 (Continued)

voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

Article 17. Additional security—Should any surety upon the bond for the performance of this contract become unacceptable to the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

Article 18. Definitions—(a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative. [50]

Article 19. Alterations—The following changes were made in this contract before it was signed by the parties hereto:

The erasure of the words "other than the contracting officer", in paragraph a, Article 18.

In Witness Whereof, the parties hereto have exe-

Plaintiff's Exhibit No. 11 (Continued)

cuted this contract as of the day and year first written.

THE UNITED STATES OF AMERICA
By W. E. REYNOLDS
Acting Director of Procurement.
Treasury Department
(official title)

McGINNIS & LANCASTE
Contractor
By W. E. LANCASTE
DAN McGINNIS
Browning, Montana.
(business address)
WESLEY EARL LANCASTE
DANIEL B. McGINNIS

Two Witnesses:
J. L. SHERBURNE
MILDRED BOWE

I, certify that I am the secretary of the corporation named as contractor herein;
that
who signed this contract on behalf of the contractor, was then of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

.....

(Corporate Seal)

Plaintiff's Exhibit No. 11 (Continued)

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, who signed this contract for the had authority to execute the same, for the individual who signs similar contracts on behalf of this corporation with the public generally.

.....

Contracting Officer. [51]

This contract is authorized by the acts of May 29, 1928, V. 45, p. 919; Dec. 20, 1928, V. 45, p. 1041; Mar. 26, 1930, V. 46, p. 120; May 13, 1930, V. 46, p. 276; May 15, 1930, V. 46, p. 349.

Directions for Preparation of Contract

1. This form shall be used for every formal contract for the construction or repair of public buildings or works, but its use will not be required in foreign countries.

2. There shall be no deviation from this standard contract form, except as provided for in these directions, without prior approval of the Director of the Bureau of the Budget obtained through the Interdepartmental Board of Contracts and Adjustments. Where interlineations, deletions, additions, or other alterations are permitted, specific notation of the same shall be entered in the blank space following the article entitled "Alterations" before signing. This article is not to be construed as general authority to deviate from the standard form. Delation of the descriptive matter not applicable in the preamble need not be noted in the article entitled "Alterations."

Plaintiff's Exhibit No. 11 (Continued)

3. The blank space of Article 1 is intended for the insertion of a statement of the work to be done, together with place of performance, or for the enumeration of papers which contain the necessary data.

4. If it be deemed necessary to include an article on Patents the Invitation to Bidders shall so state and the following article be used:

Article ..... Patents—The contractor shall hold and save the Government, its officers, agents, servants, and employees, harmless from liability of any nature or kind for or on account of the use of any patented or unpatented invention, article, or appliance furnished or used in the performance of the contract, excepting patented articles required by the Government in its specifications, the use of which the contractor [52] does not control.

5. Where only one payment is contemplated, upon completion of the contract, all except paragraph (d) of Article 16, "Payments to Contractor", must be stricken out.

6. If approval of the contract is required before it shall become binding, the following article must be added: Article..... Approval—This contract shall be subject to the written approval of..... .....and shall not be binding until so approved. Contracts subject to approval are not valid until approved by the authority designated to approve them, and the contractor's copy will not be delivered, nor any distribution made, until such approval. All changes and deletions must have been made before the contract is forwarded for approval.

Plaintiff's Exhibit No. 11 (Continued)

7. The number of executed copies and of certified copies, designation of disbursing officer, statement of appropriation, amount of bond, designation of place of inspection, as well as other administrative details, shall be as directed by the department to which the contract pertains.

8. All blank spaces must be filled in or ruled out. The contract must be dated, and the bond must bear the same or subsequent date.

9. An officer of a corporation, a member of a partnership, or an agent signing for the principal, shall place the signature and title after the word "By" under the name of the principal. A contract executed by an attorney or agent on behalf of the contractor shall be accompanied by two authenticated copies of his power of attorney, or other evidence of his authority to act on behalf of the contractor.

10. If the contractor is a corporation, one of the certificates [53] following the signatures of the parties must be executed. If the contract is signed by the secretary of the corporation, then the first certificate must be executed by some other officer of the corporation under the corporate seal, or the second certificate executed by the contracting officer. In lieu of either of the foregoing certificates there may be attached to the contract copies of so much of the records of the corporation as will show the official character and authority of the officer signing, duly certified by the secretary or assistant secretary, under the corporate seal, to be true copies.

Plaintiff's Exhibit No. 11 (Continued)

11. The full name and business address of the contractor must be inserted, and the contract signed with his usual signature. Typewrite or print name under all signatures to contract and bond.

12. The contracting officer must fill in the citation of the act authorizing the contract as indicated at the end of the last page of the contract.

13. The invitation, Bid, Acceptance, and Instruction to Bidders are not to be incorporated in the contract.

14. The specifications should include a paragraph stating the amount of liquidated damages that will be paid by the contractor for each calendar day of delay, as indicated in Article 9 of the contract.

[Endorsed]: Filed Nov. 29, 1941. C. R. Garlow, Clerk.

Mr. Wood: I am not objecting to the character of the evidence because these are photostatic copies or anything of that sort. [54]

The Court: I understand that, Mr. Wood.

Mr. Brown: If the court please, we now offer in evidence plaintiff's exhibit No. 12, which is a public voucher of the contractors to public vouchers of the contractor executed in payment for work done on this exhibit 11, together with two checks, and the two checks total the amount of the contract price.

Mr. Wood: Let the record show that Mr. Brown and I have agreed heretofore as to this character

of evidence. So far as this kind of proof is being made it will not be objected to. There is no objection, in other words, to the competency, I would say to exemplified or photostatic copies, but I do object to plaintiff's offered exhibit No. 12 upon the ground first that it is incompetent, no sufficient foundation having been laid, or proof made that the work done, or the payment made for it was for the purpose of completing the Grogan contract in accordance with the plans and specifications, etc, of the Grogan contract, and furthermore it is likewise irrelevant.

The Court: Overruled.

Whereupon plaintiff's exhibit 12 was received in evidence, and is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT No. 12

Case #203

Washington, D. C.

Treasury Nov. 24, 1934 2,380

TREASURER OF THE UNITED STATES

Division of
Disbursement
(Seal)
Object for which drawn
592134
Public Building
Construction

Pay in Dollars Two Thousand Three Hundred

Eleven 20/100 $2311.20 [55] to the Order of McGinnis & Lancaster

G. F. ALLEN
Chief Disbursing Officer
By Besnk
10-007

(Endorsed on back)

McGinnis & Lancaster

W. E. Lancaster

Dan McGinnis

Received Payment From The Treasurer of the United States Nov 30, 1934 Helena Branch Federal Reserve Bank of Minneapolis 93-26 Helena, Montana.

Public Voucher for Purchases, and Services Other Than Personal.
Standard Form No. 1084 Nov 11, 1934
592134

Voucher prepared Babb-Piegan, inspection Station, Montana. U. S. Treasury Department Office of Supervising Architect Appropriation: "Inspection Station, Babb-Piegan, Montana. 2882402
The United States, Dr. To McGinnis & Lancaster.
Address Browning, Montana.
(Paid By G. F. Allen Chief Disbursing Officer Division of Disbursement Treasury Department CK.SYM 10-007

(Payee must NOT use this space) Contract No. TIpw-359 Date 8-22-34
Activity . . INsp Sta. Babb-Piegan Montana

No. and Date of Order	Date of Delivery or Service	Articles or Services	Amount
7-20-1935	11-9-34	Contract for completion construction.	$4,280.00
		Less value work uncomplete	1,712.00
			2,568.00
		Less 10% retained	256.80
			2,311.20
		Less payments on account	0.00
		Total	$2,311.20

I certify that the above bill is correct and just, and that payment therefor has Not been received. Payee—McGinnis & Lancaster

DAN McGINNIS
W. E. LANCASTER
Title-Partners [56]

I certify that the above articles were received in good condition, after due inspection, acceptance, and delivery prior to payment as required by law, or the service performed as stated: that they were procured under the contract numbered above or unnumbered contract attached hereto, or that they were procured without written contract, in open market, and with or without advertising under the circumstances stated in No. . . . . of "method of

or Absence of Advertising" shown on reverse hereof, and were necessary for the public service; and that the prices charges are just and reasonable and in accordance with the agreement.

Approved for $2311.20
By direction of the Secretary
H. S. ROBINSON
Superintendent, Accounts
LYLE G. HOOVER
Custodian.

Paid by Check No. 2380, dated Nov. 24, 1934

Washington, D. C.
Treasury Apr. 22, 1935 4,453

TREASURER OF THE UNITED STATES

Division of
Disbursement
(Seal)
Object for which
drawn
1354521
Public Building
Construction

Pay In Dollars One Thousand Nine Hundred Sixty Eight 80/100 $1,968.80 To the Order of McGinnis & Lancaster

G. F. ALLEN
Chief Disbursing Officer
By Besnk 10-007

Received payment from the Treasurer of the United States, Apr. 27, 1935 Helena, Branch Federal Reserve Bank of Minneapolis 93-26 Helena, Montana 93-26
(endorsed on back)
McGinnis & Lancaster
W. E. Lancaster
Dan McGinnis

Public Voucher for Purchases, and Services Other Than Personal. Standard Form No. 1084. No. 1354521. [57]

Babb-Piegan, Montana 2/8/35.

Procurement Public Works Branch.

U. S. Treasury Department office of Supervising Architect.

Appropriation "inspection Station Babb-Piegan, Montana".

2x82402 (Received-Feb 21, 1935)

The United States Dr. To McGinnis & Lancaster.

Address Browning, Montana.

(Payee must NOT use this space) Contract No. TIPW-359 Activity Completion Contract Babb-Piegan, Mont.

Expenditure Symbol	Date of Delivery and Service	Articles or Services	Amount
7/20/35	1/28/35	Contract for completion construction	$4,280.00
		Less Voucher dated 11/9/34.	$2,311.20
			$1,968.80
		(Received Feb. 14, 1935 District Engineer Kansas City, Mo.	
		Total	$1,968.80

I certify that the above bill is correct and just, and that payment thereof has Not been received.

McGINNIS & LANCASTER
W. E. LANCASTER
DAN McGINNIS

I certify that the above articles were received in good condition after due inspection, acceptance, and delivery prior to payment as required by law, or the services performed as stated: that they were procured under the contract numbered above or the unnumbered contract attached hereto, or that they were procured without written contract, in open market, and with or without advertising, under the circumstances stated in No.....of "Method of or Absence of Advertising" shown on reverse hereof, and were necessary for the public service; and that the prices charged are just and reasonable and in accordance with the agreement.

Approved for $1968.80
By direction of the Secretary

H. G. ROBINSON
Superintendent, Accounts Division
LYLE HOOVER
Custodian [58]

Paid by Check No. 4453. Apr. 22, 1935. C-254.

[Endorsed]: Filed Nov. 29, 1941. C. R. Garlow, Clerk.

Mr. Brown: I might say that the two checks total the amount of $4,280.00, the amount of the contract price. However, the Government only claims as against the defendant the amount of $3,781.00, that it alleges in its complaint. I make that statement so that there won't be any contention that we might have a right to amend our complaint to conform to the proof.

Mr. Wood: Perhaps we should also state for the record, so that the court better understands, that Mr. Brown and I have agreed heretofore that there were some items included in the $4,280.00 payment that were not properly chargable against Mr. Grogan individually. That is why the amount was reduced to $3,781.00.

The Court: Very well.

Mr. Brown: Now, if the court please, in reference to paragraph 9 of the complaint, that was denied. That paragraph deals largely with the payment that we claim the United States paid, and that we are attempting to recover. We allege that they paid the construction engineer $2,288.62. I am going to offer those checks in substantiation of that. With reference to paragraph 9, your honor, Mr. Wood tells me that he will agree that the Government paid two checks to J. V. Levine, a construction engineer, between the first day of June 1933 to the thirtieth day of June, 1934, as alleged in that paragraph, the amount of $2,137.54. Now, that is a little less than the amount that we plead, but we have totaled [59] the checks that I have, and that is

the total, this $2,137.54, and Mr. Wood also tells me that he will agree that the Government paid to various of its engineers, in salaries, and in repayment for expenses, for traveling expenses incurred as alleged in paragraph 9, on January 10, July 27, October 19, November 8, and December 7, 1934, the amount of $414.00. As I understand it that is for the purpose of expediting the trial, and, of course, there is no admission of any liability, or anything of that kind.

Mr. Wood: Mr. Brown's statement in the record is correct. I do make those admissions, and agree that the sums mentioned were in fact paid to the persons to whom they were paid, but I admit nothing more.

The Court: Very well.

Mr. Brown: Mr. Wood tells me in regard to paragraph 10 of the Complaint, that he will admit that the United States paid to Grogan under his contract the amount of $49,602.50. The amount that we alleged in that paragraph in that complaint.

Mr. Wood: The record may so show. I do agree that that payment was made.

The Court: Very well.

Mr. Brown: I think the Government has established its case in chief. The matters that were in controversy were agreed to.

Mr. Wood: I now desire to move to dismiss this action as against the American Surety Company, which is the only defendant before the court, and the only defendant that has been served, upon the

ground that upon the facts and the law the plaintiff has shown no right to relief. That, of course, is in line with the objection made at the opening of the case to the introduction of any evidence, and beyond that we have no [60] proof to offer, or decline to introduce any proof, and we rest our own case.

The Court: I will take the case then, under advisement subject to your objections, and consider your briefs.

Mr. Brown: I would like to have the Court grant us twenty days within which to file our brief, and our proposed Findings of Fact and Conclusions of Law, and we would like to have five days to reply to any brief that the defendant filed in behalf of the Surety Company.

Mr. Wood: I suppose we can have twenty days intervening to file our brief.

The Court: Very well, if you deem that sufficient.

Mr. Brown: Mr. Wood has ordered a transcript for the Court's convenience, and I would ask that the order as to the brief might be that we have twenty days from the time of the delivery of the transcript.

The Court: That will be satisfactory.

[Endorsed]: Filed December 5, 1941. [61]

Thereafter, on April 27, 1942, Findings of Fact and Conclusions of Law were duly filed herein, being in the words and figures following, to wit: [62]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came regularly on for trial before the Court, sitting without a jury, on the 29th day of November, 1941, as to the defendant, American Surety Company, a Corporation, the defendant, John V. Grogan, having never been served with process herein; the plaintiff was represented by its counsel, R. Lewis Brown and W. D. Murray, Assistant Attorneys of the United States, in and for the District of Montana, and the defendant, American Surety Company, a corporation, was represented by its counsel, Messrs. Wood & Cooke; thereupon, oral and documentary evidence was introduced by and on behalf of the plaintiff herein, and at the end of the plaintiff's case, the defendant, American Surety Company, announced it had no evidence to offer; thereupon, each of the parties was by the Court given time within which to prepare and submit briefs and proposed findings of fact and conclusions of law, and each of the parties having submitted its said brief, proposed findings of fact and conclusions of law, and after consideration by the Court of the evidence and the pleadings and the briefs of the parties, and the Court being fully advised in the premises, now makes and orders filed these, its findings of fact and conclusions of law, as follows:

FINDINGS OF FACT

1.

That on the 24th day of June, 1931, the plaintiff and the [63] defendant, John V. Grogan, entered into the contract, in writing, which is attached to the plaintiff's complaint as Exhibit "A", for the construction and erection of certain buildings at the United States Inspection Station at Babb-Piegan, in the State and District of Montana, for the price of $49,970.00, to be paid to the said contractor upon full completion of the work in the time and in the manner provided in said contract; that while the said contract was in full force and effect, certain changes in the work to be done and certain extra work and materials were agreed to be furnished of the reasonable value of $3921.00, which said sum the United States agreed to pay, which increased the amount to be paid by the United States to the contractor to the sum of $53,891.00 for the completion of the work at the time and in the manner as provided in the said contract.

2.

That at all of the times mentioned in the plaintiff's complaint and the evidence, the defendant, American Surety Company, a Corporation, was, and continued to be, a corporation duly organized and authorized to become a surety for hire.

3.

That on or about the 29th day of June, 1931, the defendant, American Surety Company, a Corpora-

tion, became a surety for the defendant, John V. Grogan, and his faithful performance of the contract, and the said defendants made, executed, and delivered to the plaintiff the instrument and bond attached to the plaintiff's complaint as Exhibit "B", and that the said Surety Company was a surety for hire on said bond.

4.

That notice to proceed under said contract, as provided by the terms thereof, was given to the said John V. Grogan on the 8th day of July, 1931, and he thereupon commenced his performance of said contract.

5.

That for causes considered excusable by the plaintiff under Article 9 of the said contract, the plaintiff, at the request of the defendant, John V. Grogan, and with the consent [64] of the defendant Surety Company, extended the time for the completion of the work under the said contract to June 20, 1933.

6.

That it was provided in said contract that the contractor should pay to the plaintiff the amount of $25.00 a day as fixed, agreed, and liquidated damages for each calendar day's delay in the completition of the contract.

7.

That the defendant, John V. Grogan, had not completed the work he agreed to perform under the said contract upon the 20th of June, 1933, and he

had not completed all the work he promised and agreed to do in said contract on the 20th day of July, 1934, and on said 20th day of July, 1934, he being in default under said contract and having breached the same, and because of said default and breach, and as provided in the said contract, the plaintiff, on the said 20th day of July, 1934, gave to the defendant, John V. Grogan, a notice, in writing, that his right to proceed under the said contract was terminated on said 20th day of July, 1934.

8.

That because of the failure of the said defendant, John V. Grogan, to perform his contract, as he was required to do, and to complete the work which he had promised and agreed to complete within the time specified in said contract and granted by the plaintiff, it became necessary for the plaintiff to cause the said work to be completed and performed, and at the request of the defendant, American Surety Company, a Corporation, the plaintiff advertised for bids for doing and completing the said work, and let the contract for completing the said work to the lowest, responsible bidder.

9.

That because of the failure of the defendant, John V. Grogan, to perform his said contract and his breach thereof, the plaintiff was required to, and did, necessarily lay out and expend the sum of $2,044.04 more in causing the said work [65] to be done and in completing the said contract than it

would have been required to lay out and expend had the said defendant, John V. Grogan, duly performed his said contract and completed the work, as he had promised and agreed to do.

10.

That 395 calendar days elapsed between the 20th day of June, 1933, the time fixed under the contract for the completion of the said work, and the 20th day of July, 1934, the date upon which the defendant's, John V. Grogan's, right to proceed under the contract was terminated by the plaintiff.

11.

That, except as expressly contrary hereto, the Court finds all of the facts set out in the plaintiff's complaint to be true and established by the evidence, and the affirmative facts set out in the Answer of the defendant, American Surety Company, a Corporation, to be not established by the evidence.

From the foregoing findings of fact, the Court concludes the law, as follows:

CONCLUSIONS OF LAW

1.

That the Court has jurisdiction hereof.

2.

That because of the failure of the defendant, John V. Grogan, to complete his said contract and perform the work he agreed therein to do and perform, the plaintiff was required to perform the

same at an additional cost and expense to it in the amount of $2,044.04, and has been damaged in that amount.

3.

That by reason of the delay of 395 calendar days on the part of the defendant, John V. Grogan, in his completion of the said contract, the palintiff has been damaged in the sum of $9,875.00.

4.

That the plaintiff is entitled to recover of and from the defendant, American Surety Company, a Corporation, [66] the sum of $2,044.04, and the further sum of $9,875.00, with interest thereon at the rate of six per cent (6%) per annum from the 1st day of November, 1937, and for its costs of suit herein necessarily expended, and is entitled to a judgment therefor.

Done and dated, April 27th, 1942.

CHARLES N. PRAY
Judge.

Lodged in Clerk's Office Jan. 20, 1942. C. R. Garlow, Clerk.

[Endorsed]: Filed April 27, 1942. [67]

Thereafter, on April 27, 1942, Judgment was duly filed and entered herein, being in the words and figures following, to-wit: [68]

In the District Court of the United States
District of Montana
Great Falls Division

No. 203

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN V. GROGAN and AMERICAN SURETY COMPANY, A Corporation,

Defendants.

JUDGMENT

This cause came regularly on for trial before the Court, Honorable Charles N. Pray, Judge presiding, sitting without a jury, on the 29th day of November, 1941, as to the defendant, American Surety Company, a corporation; plaintiff was represented by its counsel, W. D. Murray and R. Lewis Brown, Assistant Attorneys of the United States in and for the District of Montana, and defendant, American Surety Company, a corporation, was represented by its counsel, Messrs. Wood & Cooke; thereupon oral and documentary evidence was introduced by and on behalf of the plaintiff herein and no evidence was introduced either by or on behalf of the defendant, American Surety Company, a corporation; thereupon and at the close of plaintiff's evidence, both parties having rested, the plaintiff and the defendant, American Surety Company, a corporation,

asked for and were granted time within which to prepare, serve and filed their briefs and proposed findings of fact and conclusions of law; said briefs and proposed findings of fact and conclusions of law thereafter having been filed, the cause was submitted to the Court for consideration and decision.

Thereafter, the Court, having fully considered all of the evidence, introduced, as well as the admissions made by counsels at the trial of the cause, together with the briefs of the parties hereto, and being duly advised as to the law and the facts, did on the 15th day of April, 1942, render its opinion herein in favor of the plaintiff and against the defendant, [69] American Surety Company a corporation, and did thereafter and on the 27th day of April, 1942, make and sign and order filed its findings of fact and conclusions of law herein, and the same were entered and filed in the office of the Clerk of this Court on said date and are herein referred to and hereof made a part as fully and as completely as though here set out at length.

Wherefore, by reason of the law and the premises and the findings of fact and conclusions of law of the Court, It Is Ordered, Adjudged and Decreed and this does Order, Adjudge and Decree that the plaintiff, United States of America, do have and recover of and from the defendant above-named, American Surety Company a corporation, the sum of $11,919.04, together with interest at the rate of six (6%) per cent. per annum from the 1st day of November, 1937, amounting to the further sum of $2,-

481.15, amounting in all, principal and interest, to the sum of $14,400.19, together with the plaintiff's costs and disbursements herein necessarily incurred, amounting to the sum of $33.20.

Done and Dated April 27th, 1942.

CHARLES N. PRAY
United States District Judge.
District of Montana.

[Endorsed]: Filed & Entered Apr. 27, 1942. [70]

Thereafter, on July 21, 1942, Notice of Appeal was duly filed herein, being as follows, to wit: [71]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To United States of America, the above named Plaintiff, and to R. Lewis Brown, Assistant Attorney for the United States, in and for the District of Montana, its attorney, and to the Clerk of the Above Named Court:

You and each of you will please take notice that the Defendant, American Surety Company, a corporation, in the above entitled action, by and through the undersigned its attorneys, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, and the whole thereof, made and entered in favor of

the Plaintiff and against the Defendant, American Surety Company, a corporation, in the above entitled action upon the 27th day of April, 1942.

Dated this 20th day of July, A. D. 1942.

STERLING M. WOOD and
ROBERT E. COOKE
By STERLING M. WOOD
Attorneys for Defendant,
American Surety Company,
a corporation.

[Endorsed]: Filed July 21, 1942. C. R. Garlow, Clerk. [72]

Thereafter, on July 21, 1942, Cost Bond on Appeal was duly filed herein, being as follows, towit: [73]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, American Surety Company, a corporation, as Principal, and New York Casualty Company as Surety, are held and firmly bound unto United States of America in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid to the said United States of America, to which payment well and truly to be made we bind

ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals this 29th day of June in the Year of Our Lord 1942.

Whereas, lately in the above entitled action a judgment was rendered against the Defendant, American Surety Company, a corporation, therein, and the said Defendant is about to appeal, to the United States Circuit Court of Appeals for the Ninth Circuit, from the said judgment, and the whole thereof, to reverse the said judgment;

Now, Therefore, the condition of the above obligation is such that if the above named Defendant, American Surety Company, a corporation, shall pay all costs, if the said appeal is dismissed or judgment affirmed, or shall pay such costs as the appellate [74] court may award if the said judgment is modified, then the above obligation to be void; else to remain in full force and virtue.

In accordance with Rule 90 of the Rules of the above-named District Court of the United States, for the District of Montana, the said New York Casualty Company the surety herein, expressly agrees that in case of a breach of any condition of this bond that the above named court, upon notice to the said surety of not less than ten days, may proceed summarily in the above entitled action in which this bond is being given, to ascertain the amount which the said surety is bound to pay on account of such breach, and render judgment there-

for against the said surety, and award execution therefor.

[Seal] AMERICAN SURETY COMPANY, a corporation

By N. KLOTZ

Its Resident Vice-President

Attest:

A. DONALDSON

Res. Asst. Secretary

[Seal] NEW YORK CASUALTY COMPANY

By W. D. HABISH

Its Resident Vice-President

Attest:

A. DONALDSON

Resident Asst. Secretary

Countersigned:

SCHROEDER BROS. CO.

By JOHN W. SCHROEDER,

Secy.

Resident Agent New York Casualty Company at Helena, Montana.

[Endorsed]: Filed July 21, 1942. C. R. Garlow, Clerk. [75]

Thereafter, on July 29, 1942, Stipulation as to contents of Record on Appeal was duly filed herein, as follows, towit: [76]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the undersigned attorneys for the respective parties to the above entitled action as follows, to-wit:—

I.

That the part of the record in the above entitled action to be included in the record on appeal of said action from the above named Court to the United States Circuit Court of Appeals for Ninth Circuit shall be as follows, to-wit:—

(a) Plaintiff's Complaint.

(b) Notice and motion of October 7, 1940 to strike portions of Plaintiff's Complaint.

(c) Minute order of July 22, 1941, denying the last mentioned motion.

(d) Answer of the Defendant, American Surety Company of New York.

(e) Original transcript of evidence taken at the trial of said action and prepared by the court reporter who reported the trial.

(f) Findings of Fact and Conclusions of Law adopted by the Court.

(g) Judgment of April 27, 1942

(h) This stipulation.

(i) Notice of Appeal of the Defendant, American Surety Company of New York.

(j) Cost bond on appeal of the Defendant, American Surety Company of New York. [77]

This stipulation is made under Rule 75 (f) of the Rules of Civil Procedure for the District Courts of the United States and instead of serving designations as provided for in Rule 75 (a) of the aforesaid rules.

Dated this 22nd day of July, A. D. 1942.

R. LEWIS BROWN
Assistant Attorney of the United States, in and for the District of Montana
STERLING M. WOOD and
ROBERT E. COOKE
By STERLING M. WOOD
Attorneys for Defendant, American Surety Company, a corporation.

[Endorsed]: Filed July 29, 1942. C. R. Garlow, Clerk. [78]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for Ninth Circuit, that the foregoing volume consisting of

81 pages, numbered consecutively from 1 to 81 inclusive, constitutes a full, true and correct transcript of all portions of the record in Case Number 203, United States of America vs. John V. Grogan and American Surety Company, a corporation, designated by the parties as the record on appeal herein, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that the costs of said Transcript of Record amount to the sum of Thirty-seven and no/100ths.....Dollars, and have been paid by the appellant.

Witness my hand and the seal of said court at Great Falls, Montana, this 29th day of July, A. D. 1942.

[Seal] C. R. GARLOW,
Clerk, U. S. District Court,
District of Montana.
By C. G. KEGEL
Deputy Clerk. [81]

[Endorsed]: No. 10229. United States Circuit Court of Appeals for the Ninth Circuit. American Surety Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed August 24, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10229

AMERICAN SURETY COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS AND DESIGNATION UNDER RULE 19

Comes now the Appellant in the above-entitled action, by and through the undersigned its attorneys, and in compliance with paragraph 6, Rule 19, of the rules of the above-named Court, states that the points on which the said Appellant intends to rely on the appeal taken in the said action are as follows, to-wit:

(a) That under the pleadings and the evidence in said action the Appellee is not entitled in any event to recover liquidated damages;

(b) That there has been a complete failure of proof by the Appellee and that accordingly the judgment from which the appeal has been taken in the above-entitled action is without support in the record;

(c) That there is no evidence in the record to support the judgment from which the appeal in the above-entitled action has been taken.

And the said Appellant further states that the parts of the record which it deems necessary for a consideration of the appeal in the above-entitled action are the pleadings, evidence and judgment, and preliminary motions and orders, all as more particularly set forth in the stipulation of the parties to the said action as to the part of the record to be included in the record on appeal, to which said stipulation reference is hereby made.

Dated at Billings, Montana, this 10th day of September, A. D. 1942.

STERLING M. WOOD
and
ROBERT E. COOKE
By STERLING M. WOOD
Attorneys for Appellant.

[Endorsed]: Filed Sep. 14, 1942.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10229

AMERICAN SURETY COMPANY, A CORPORATION, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Upon Appeal from the District Court of the United States for the District of Montana

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Thursday, April 22, 1943

Before GARRECHT, HANEY, and HEALY, Circuit Judges

Order of submission

Ordered appeal herein argued by Mr. Sterling M. Wood, counsel for appellant, and by Mr. John B. Tansil, United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Thursday, June 24, 1943

Before GARRECHT, HANEY and HEALY, Circuit Judges

Order directing filing of opinion and filing and recording of judgment

By direction of the Court, ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10,229—Jun. 24, 1943

AMERICAN SURETY COMPANY, A CORPORATION, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Upon Appeal from the District Court of the United States for the District of Montana

Before GARRECHT, HANEY, and HEALY, Circuit Judges

HEALY, C. J.

One Grogan entered into a contract with the United States for the erection of some buildings at the Government inspection station at Babb-Piegan, Montana. Appellant wrote the bond securing the performance of the contract. Grogan's time for the completion of the buildings expired June 20, 1933, at which date the work was only partially completed. However, the Government permitted him to continue with it for thirteen months thereafter, or until July 20, 1934, at which time the job was still uncompleted. Grogan was then notified that his right to proceed under the contract was terminated; and the Government thereupon took over the work and finished it.

The contract is the standard form of construction contract. Article 9 thereof, so far as pertinent, reads as follows:

"Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay

until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof; * * *"

The liquidated sum agreed upon was $25.00 per day.[1]

In this suit, which is against the surety alone, the court awarded two items of damage: (1) the sum of $2,044.04 as the excess cost of completing the structures; and (2) the sum of $9,785.00 as liquidated damages for the delay of 395 calendar days elapsing between the date the work should have been completed under the terms of the contract and July 20, 1934—the date when the Government itself took over. The main dispute here concerns the latter award.

Counsel for the Government say that Article 9 covers three distinct situations: (1) where, at or before the date fixed for completion, the Government elects to terminate the contractor's right to proceed and takes over the work itself or through some other contractor; (2) where the Government elects to allow the contractor to continue after the date specified for completion, and the contractor finishes the work late; and (3) where the Government elects to allow the contractor to continue after the date specified for completion, but the contractor fails to finish the work even at a later date, and the Government then elects to terminate his right to proceed and finishes the work itself or through another contractor. The parties are agreed that in situation (1) the liquidated damages provision is not operative, and that in situation (2) it is. The point of disagreement is whether the provision is operative in situation (3), or, to state the disagreement more specifically, whether Article 9 makes any provision for a case like the present.

It is to be observed that there is here no question of actual damages recoverable under principles of the common law. The inquiry relates merely to the reach of a special stipulation agreed upon as a substitute for the ordinary mode of proving damages. By its very nature a stipulation for liquidated damages has no force save in the contingency made the subject of the special agreement.[2] To extend the stipulation to other contingencies by a process of reasoning or by analogy would amount to a rewriting of the contract.

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[1] The Act of June 6, 1902, 32 Stat. 326, 40 U. S. C. A. § 269, provides: "In all contracts entered into with the United States for the construction or repair of any public building or public work under the control of the Treasury Department, a stipulation shall be inserted for liquidated damages for delay; and the Secretary of the Treasury is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable; and in all suits commenced on any such contracts or on any bond given in connection therewith it shall not be necessary for the United States, whether plaintiff or defendant, to prove actual or specific damages sustained by the Government by reason of delays, but such stipulation for liquidated damages shall be conclusive and binding upon all parties."

[2] 15 Am. Jur., Damages, § 261; Wise v. United States, 249 U. S. 361.

Under this contract not all inexcusable delays are made compensable by payment of the stipulated sum. Thus where the contractor breaches his agreement to finish the work within a specified time and the Government declines to allow him to proceed beyond the completion date, vexatious delays resulting in the temporary loss of use of a needed structure inevitably ensue; but in such contingency the Government has limited itself to the recovery of excess costs plus such other damages, not inconsistent with the contract, as are recoverable under general legal principles. In what contingency, then, is delay here made compensable by the exaction of the stipulated sum? The sole contingency specified is "if the Government does not terminate the right of the contractor to proceed." The situation contemplated—or at any rate agreed upon—is one where the contractor, although failing to complete the work on time, is allowed to continue with it to completion or acceptance. In that event only, it was agreed a specific sum was recoverable in lieu of the damages actually sustained but thought incapable of proof. What the trial court did was to extend the agreement to a different situation, one in which it might well have been, but was not, agreed that the stipulation should govern.

Counsel for the Government make this argument: "If the right to delay damages is conditioned upon the government's never taking over the work no matter how long the contractor's delay nor what the reason for it, then in every case the contractor and his surety can avoid liability for delay damages by the easy expedient of refusing to fulfill his obligation to continue the work, stopping just short of completion, and forcing the government to take over." The argument appears to neglect the right of the Government to recover actual damages for delay, or to confuse that right with the totally different one in dispute here. The Government had the option of terminating Grogan's right to proceed at any time after June 20, 1933. When it finally did so because of Grogan's continuing default, its action rendered the stipulation for liquidated damages inoperative. The stipulation simply vanished from the picture, so that neither party is in a position to invoke it. But it does not follow that the Government was thereby stripped of the right to recover such actual damages for the delay as it might be able to prove. Inability of the Government to make the necessary proof affords no justification for stretching the agreement to fit the Government's necessities.[3]

[3] Cf. United States v. O'Brien, 220 U. S. 321; Stone Sand & Gravel Co. v. United States, 234 U. S. 270.

The Court of Claims, in a number of cases, has had occasion to interpret this article of the standard contract and has reached the same conclusion as ourselves, albeit by a somewhat different route.[4] So also has the Court of Appeals of the District of Columbia.[5] No other cases dealing directly with the point have been called to our attention.

Appellant takes exception also to the award of excess costs. As to this item the court found that because of Grogan's failure to perform his contract the Government necessarily expended the sum of $2,044.04 more in causing the work to be done and in completing the contract than it would have been required to pay out had Grogan duly performed. It is claimed that the proof is insufficient to support this finding or to justify the award.

We do not agree. It was shown that the surety was given notice that a Government construction engineer would take inventory of the state of the work, and an invitation was extended the surety to have a representative present. The surety was requested also to advise whether it desired to complete the work. The only response to these invitations was a request by the surety that the contracting officer obtain bids and award the contract for completion to the lowest bidder.

This the officer proceeded to do. A contract was let for the performance of all work and the furnishing of all labor and materials "required for completion of the construction of the Inspection Station at Babb-Piegan, Montana." The surety has not challenged the reasonableness or good faith of the determination by the contracting officer embodied in the latter's specifications as to the work necessary to carry the project to completion. It made no effort to show any discrepancy between the specifications of the original contract and those of the contract let for completion of the work. By Article 15 of the Grogan contract the parties had agreed that the contracting officer or his representative should decide all disputes concerning questions of fact arising thereunder. Grogan's default and the surety's ensuing request made it necessary for the contracting officer to determine what must be done to complete Grogan's undertaking. In performing this duty the contracting officer had to make a determination of fact. The officer's determination, we think, was inseparable from the duty resting on him under the contract, the performance of which appellant had guaranteed.

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[4] Fidelity Casualty Co. of N. Y. v. United States, 81 Ct. Cls. 495; Commercial Casualty Insurance Co. v. United States, 83 Ct. Cls. 367; American Employer's Insurance Co. of Boston v. United States, 91 Ct. Cls. 231; Maryland Casualty Co. v. United States, 93 Ct. Cls. 247.

[5] United States v. Cunningham, 125 F. 2d 28.

In respect of the award of liquidated damages the judgment is reversed. As regards the award of excess costs it is affirmed.

Haney, C. J., did not participate in the consideration or decision of this case.

[Endorsed:] Opinion. Filed Jun. 24, 1943. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 10229

AMERICAN SURETY COMPANY, A CORPORATION, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Judgment

Upon appeal from the District Court of the United States for the District of Montana.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Montana, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause with respect to the award of liquidated damages be, and hereby is reversed, and that the judgment of the said District Court in this cause as regards the award of excess costs be, and hereby is, affirmed.

[Endorsed:] Judgment. Filed and entered June 24, 1943. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 10229

AMERICAN SURETY COMPANY, A CORPORATION, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Certificate of Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit to record certified under Rule 38 of the revised rules of the Supreme Court of the United States.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing

one hundred (100) pages, numbered from and including 1 to and including 100 to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof, remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 16th day of August 1943.

PAUL P. O'BRIEN.
Paul P. O'Brien, *Clerk*.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

No. 203

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOHN V. GROGAN, AND AMERICAN SURETY COMPANY, A CORPORATION, DEFENDENTS

The above-entitled action was tried to the court without the intervention of a jury, according to agreement of counsel.

The purpose of the action is to recover damages allegedly sustained by plaintiff for failure of defendant Grogan to perform a written contract for the construction of an Immigration Station at Babb-Piegan, Montana. Service was not obtained upon the defendant contractor, John V. Grogan, and trial was had against the defendant, American Surety Company. From an examination of the pleadings, transcript of evidence, briefs, admissions and denials of the parties, the court is satisfied that the allegations of the complaint have been sustained by a clear preponderance of the evidence, no proof having been submitted on the part of defendant, Surety Company, it having rested its defense mainly upon its interpretation of article nine of the contract in question.

The defendant Grogan was delayed 473 days in the performance of his contract and at his request and with consent of plaintiff and of the defendant American Surety Company, the time for the completion of the work under the contract was extended until June 20, 1933, which would indicate that the contractor was given considerable latitude in the performance of his contract, and aside from having the date for completion extended, after such delays, he was also allowed 13 months more, after the date fixed for completion, for performance of his contract, before the government terminated his right to proceed further. The contractor was given this opportunity to finish the work, and for that period of time, after the definite date for completion. The government during that period was deprived of the use and occupation of the premises, and there is nothing in the language

of the contract to warrant the interpretation that there was a choice of two remedies in case of default, which when made would exclude the other. Material part of article 9, in question, reads as follows: "Article 9, Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof * * *."

Whether the plaintiff would be entitled to exercise both remedies provided in the contract would depend upon the state of facts before the court. If on the date when the work was to be completed the plaintiff had terminated the contract, the provision for the payment of $25.00 per day for each day of delay up to the date of completion could not apply for obvious reasons. But if the contractor is allowed to go ahead after the due date and dallies along with the work for 13 months without finishing, it would seem to be the better sense and reasoning to hold that the plaintiff would be entitled to collect for such delay according to the plain terms of the contract.

It seems to this court that the choice of language in article 9 was wisely made to provide for just such a state of facts as is found to exist here. What is there in the wording of the article to justify the assumption, following one line of authorities, that upon the adoption of one course the other "passes out of the picture." When the contractor is given an opportunity to make

good his promise, after failure to perform in time, and fails again after depriving the government of the use of its property for 13 months, so that it is obliged to take over the work, is not such a contingency precisely provided for in article 9. To adopt the interpretation contended for by defendant's counsel the government would be powerless to collect the amount agreed to be paid per day for failure to complete the work on the date agreed upon, if it should at any time terminate the right to further delay the completion of the work, no matter to what extent or for how long a period the contractor dragged the work along, whether for 13 months, as here, or for as many years. If the government terminated the contractor's right to proceed nothing could be collected under the contract, no matter what the damage to plaintiff for loss of use and occupancy of the building; plaintiff could recover only the additional cost of completing the unfinished job. If that meaning is to be read into the contract, under the state of facts here, the only way the plaintiff could have protected itself from damage would be to have ended the right of the contractor to proceed further on the date agreed upon for the completion of the work, the balance of article 9 for unliquidated damages at $25.00 per day would seem to be absolutely meaningless. This court may be in error, but it probably will not be long before the higher court will have an opportunity to correct it, at any rate, for the 9th Circuit. This court has given much thought to the principal question involved since the trial and after consideration of the able briefs filed by counsel, but has been unable to find sufficient reason to change the views expressed in the memorandum opinion written on overruling the defendant's Motion to Dismiss (39 Fed. Supp. 819), consequently the decision here will be in favor of the plaintiff with costs.

Findings of ultimate facts and conclusions will be submitted conformably to the foregoing views.

CHARLES N. PRAY, *Judge.*

Filed April 15, 1942.
C. R. GARLOW, *Clerk.*

In the District Court of the United States in and for the District of Montana

UNITED STATES OF AMERICA,
District of Montana, ss:

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing is a full, true, and correct copy of the decision of the court on the

merits, in case No. 203, *United States of America, Plaintiff*, vs. *John V. Grogan et al., Defendants*, as appears from the original thereof now remaining on file in my office as such Clerk, on file and of record in said Court.

Witness my hand and the seal of said court at Great Falls, Montana, this 18th day of September, A. D. 1943.

[SEAL]

C. R. GARLOW,
Clerk as aforesaid.
By C. G. KEGEL,
Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES,
DISTRICT OF MONTANA

GREAT FALLS DIVISION

No. 203

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOHN V. GROGAN, AND AMERICAN SURETY COMPANY, A CORPORATION, DEFENDANTS

The defendant Surety Company in the above-entitled cause submits a motion to strike from the complaint all of paragraph XI thereof for the reason that the matters therein alleged are redundant and immaterial. To sustain the motion defendant cites article 9 of the construction contract pleaded as an exhibit in the complaint, and alleges that it is identical with a like numbered article 9 included in a certain construction contract construed by the Court of Claims of the United States in the case of *The Fidelity & Casualty Company of New York* v. *The United States*, 81 Court of Claims, 495, wherein the Court held: "In this case the principal's liability is fixed in the terms of the contract. Under article 9 above quoted both parties agreed upon failure of the Contractor to perform the work within the time fixed in the contract the Government had at its election two courses which it could pursue. The first was to terminate the contract and hold the Contractor and his surety for the excess costs of completion and actual damages suffered. The second course was to allow the Contractor to continue to perform the contract and to charge him liquidated damages for failure to deliver on time. The amount of this damage both parties had agreed in the contract would be a certain amount for each day completion was delayed from the time fixed for completion. The defendant elected to choose the first of these alternatives and when that decision was made the second alternative disappeared from the picture. It was thereafter mere surplusage. Upon the termination of the contract no liquidated damages could be charged to or be recoverable from the Contractor. The release of the principal from the liability released the surety." Therefore, in the instant case, the defendant surety claims that since the Government elected to complete the work and sustained damages, as alleged, in the sum

of $2,195.12, being the difference in cost between the contract price and the amount expended by the Government, the rule of the above-cited case would apply, and the Government would have no right to recover liquidated damages.

As another ground for the elimination of paragraph XI defendant cites *Clifton* v. *Willson*, 47 Mont. 305, claiming that under Montana law one seeking to recover liquidated damages must allege and prove facts indicated in sections 7556 and 7557 R. C. M. 1935. But in article 9 of the present contract the substance of the provisions of both sections of the statute above referred to, are embodied by agreement in the following language: "If the Government does not terminate the right of the Contractor to proceed, the Contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the Contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the Contractor and his sureties shall be liable for the amount thereof."

Further allegations and proof of the facts where the parties themselves have agreed precisely in the terms of the statute would seem to be unnecessary. The case cited refers to a contract for liquidated damages, not including the exception contained in section 7557, which provides: "The parties to a contract may agree therein upon an amount which shall be presumed to be an amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." But it must be remembered that this is not a suit between private parties, but a suit by the United States to enforce its contract in its own court in respect to its property rights and that the federal statutes and decisions would therefore control.

There is nothing in the complaint from which it might be inferred that the Contractor abandoned his contract, on the contrary it does appear that he was allowed to continue long after the date when he had agreed to complete the work. This would indicate that the Contractor continued under his contract, with the consent of the Government, after the expiration date of the contract, thereby becoming liable for the damage agreed upon for every day's delay after the expiration date.

The time for completion of the contract, after certain extensions had been granted, was June 20th, 1933. In paragraph VIII of the complaint it is alleged that the Contractor had not completed the contract on June 20th, 1933, and that he had not completed all of the work he was required to do under the contract on

July 20th, 1934, and that because of his breach, on July 20th, 1934, plaintiff notified the defendant Contractor, that his right to proceed further under the contract was terminated on that date. It seems apparent that no further delay could be permitted and consequently the Contractor and surety were notified on July 20th, 1934, that the right to proceed further under the contract was terminated. In view of these facts would not the Government under the contract have the right to claim the amount agreed upon for each day of delay from June 20th, 1933 to July 20th, 1934? The facts in this case are different from those appearing in the authority cited from the Court of Claims. In that case, on the date when the work was to have been completed, to wit: February 10th, 1932, the Government notified the Contractor that his right to proceed with the work was terminated in accordance with article 9 of the contract. The Contractor was not permitted to continue after that date and the Government took possession. The Government then entered into a new contract with the surety for the completion of the work, although not authorized so to do under the original contract, and no assignment had been made thereof by the Contractor to the surety. The Court there held that the liquidated damage clause could not have been revived except by changing the terms of the original contract, which provided that the Contractor should pay liquidated damages for each calendar day of delay until the work was completed or accepted, when he was allowed to continue after the date fixed for completion.

From a consideration of the facts in the two leading cases relied upon by counsel, this Court is not prepared to hold that they are greatly in conflict, and that the decisions cannot be reconciled. In the Court of Claims case the Government stopped the work on the date when it was to have been completed, but was not completed. Under that certain state of facts disclosed, having exercised one of the remedies it might be doubtful whether the other would be available. Here the Contractor was given opportunity to complete the work for thirteen months after the date agreed upon for completion, and allowed to remain in full control until the Government apparently was forced to take over the work to protect its own interests, with no prospect of the Contractor being able to perform his contract. In considering the last case cited by counsel for plaintiff. (*Continental Casualty Co.* v. *United States*, 29 Fed. Supp. 598; affirmed 113 Fed. (2) 294, C. C. A. 5.) it appears that the principal facts there are much like the facts in the present case, and it is evident that both Courts in construing paragraph 9 in that case, which is the same as paragraph 9 in this case, held in effect that the Government was accorded

two remedies, both of which could be exercised in a proper case and both of which were exercised in the case cited, as plaintiff is seeking to do in this case. If the Court were to hold to defendant's theory the Government would be deprived of recovering the amount agreed upon for delay after waiting for thirteen months after date of expiration for the Contractor to finish his work.

In the Court's opinion the motion to strike should be denied, and it is so ordered. In the event other pertinent authorities may be discovered by counsel, the question here may again be considered at the trial.

CHARLES N. PRAY, *Judge.*

Filed, July 22, 1941.
C. R. GARLOW, *Clerk.*

In the District Court of the United States in and for the District of Montana

UNITED STATES OF AMERICA,
District of Montana, ss:

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing is a full, true and correct copy of the decision of the court on Defendant's Motion to Strike in case No. 203, *United States of America, Plaintiff*, vs. *John V. Grogan, et al., Defendants*, as appears from the original thereof now remaining on file in my office as such Clerk, on file and of record in said Court.

Witness my hand and the seal of said court at Great Falls, Montana, this 18th day of September, A. D. 1943.

[SEAL]

C. R. GARLOW,
Clerk as aforesaid.
By C. G. KEGEL.
Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1943

Supreme Court of the United States

Order allowing certiorari

Filed November 8, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1943